Mercy Hospital of Buffalo *and* Communications Workers of America, Local No. 1133, AFL–CIO. Case 3–CA–21600

December 18, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

On June 27, 2000, Administrative Law Judge Karl H. Buschmann issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed cross-exceptions, a supporting brief,[1] and a brief in answer to the Respondent's exceptions. The Respondent filed a brief in answer to the cross-exceptions.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions, as modified below, and to adopt the recommended Order as modified.

The issues presented in this case arise from the formation of Southtowns Catholic MRI, Inc. as a joint venture by Respondent Mercy Hospital (the Respondent), and Our Lady of Victory Hospital. Southtowns Catholic MRI was created for the purpose of providing magnetic resonance imaging (MRI) diagnostic health care services. Following the formation of Southtowns Catholic MRI, the Respondent ceased providing MRI services at its Western New York Medical Park satellite facility (the Medical Park), and began referring patients to Southtowns Catholic MRI. The transfer of MRI services from the Medical Park to Southtowns Catholic MRI resulted in the elimination of two MRI technologist positions from the unit of Respondent's service, technical, and clerical employees represented by the Union.

The complaint alleges that the Respondent and Southtowns Catholic MRI, Inc., are a single employer and that the Respondent violated Section 8(a)(5) and (1) by failing to apply the terms of its collective-bargaining agreement with the Union to employees performing MRI services at the Southtowns Catholic MRI facility. The complaint further alleges that the Respondent violated Section 8(a)(5) and (1) by failing to bargain over the decision to relocate MRI services to the Southtowns Catholic MRI, or the effects of the decision, and by failing to provide the Union with requested information about the formation and operation of Southtowns Catholic MRI.

The judge found that the Respondent and Southtowns Catholic MRI are a single employer and that the Respondent therefore violated Section 8(a)(5) and (1) by refusing to apply its collective-bargaining agreement with the Union to employees performing MRI services at the new facility. He further found that the Respondent unlawfully failed to provide the Union with requested information about Southtowns Catholic MRI. He dismissed the allegation that the Respondent violated Section 8(a)(5) and (1) by failing to bargain over the decision to relocate MRI services.[2] We adopt the judge's finding that the Respondent unlawfully refused to provide the requested information. However, for the reasons explained below, we reverse the judge's finding that the Respondent and Southtowns Catholic MRI are a single employer, and we dismiss the remaining complaint allegations.

FINDINGS OF FACT

The Respondent operates an acute care hospital and various satellite facilities. It is one of five hospitals in Western New York owned by the Catholic Health System. The other hospitals in the Catholic Health System are Our Lady of Victory Hospital, Sisters of Charity Hospital, St. Joseph's Hospital, and Kenmore Mercy Hospital.[3]

Since September 26, 1991, the Union has represented a unit of the Respondent's service, technical, and clerical employees (STC unit) at Mercy Hospital and numerous satellite facilities. The Respondent's recognition of the Union has been embodied in successive collective-bargaining agreements.

In January 1995, the Respondent acquired a radiological services practice in West Seneca, New York, in a complex known as the Medical Park. Since that time, it has provided radiological, physical therapy, occupational therapy, and some laboratory services at the Medical Park. Prior to the formation of Southtowns Catholic MRI, all MRIs ordered by doctors at the Respondent took place at the Medical Park, unless otherwise specified by the doctor. The Union represents the service, technical, and clerical employees of the Respondent at the Medical Park, including MRI technologists.

In 1997, the Respondent, Our Lady of Victory Hospital, and Abbott Radiology[4] began discussing the formation of a joint venture to purchase and operate a new, state-of-the-art MRI machine, capable of performing

[1] We reject the Respondent's motion to strike the General Counsel's cross-exceptions as untimely. Administrative records show that the brief in support of exceptions was filed on a timely basis and that the cross-exceptions were inadvertently omitted. The General Counsel corrected this inadvertence by faxing the cross-exceptions to the Board the next day.

[2] As noted above, the complaint also alleged that the Respondent violated Sec. 8(a)(5) by failing to bargain over the effects of its decision to relocate the MRI services. However, the judge inadvertently failed to make a finding on this issue. We address this allegation in part 3 of our decision below.

[3] The Catholic Health System also includes two home health care agencies and 13 long-term care facilities.

[4] Abbott Radiology is an independent group of radiologists, which is not owned by or affiliated with the Catholic Health System.

magnetic resonance angiograms (MRAs). At that time, the three entities were operating separate MRIs, none of which were capable of performing MRAs.

As a result of the discussions between the Respondent, Abbott Radiology, and Our Lady of Victory, two new companies were formed: Southtowns MRI Associates, L.L.C., and Southtowns Catholic MRI. Southtowns MRI Associates is owned 25 percent by the Respondent, 25 percent by Our Lady of Victory, and 50 percent by Abbott. Southtowns Catholic MRI is owned 50 percent by the Respondent and 50 percent by Our Lady of Victory.

Southtowns MRI Associates constructed a new building on property leased from the Respondent at the Mercy Ambulatory Care Center (the MACC), in Orchard Park, New York. Southtowns MRI Associates then purchased and installed a new MRI machine in the building. Southtowns Catholic MRI leases the building and the MRI from Southtowns MRI Associates.

The intent of the Respondent was for Southtowns Catholic MRI to manage and operate the new MRI after obtaining the necessary New York licenses. However, since the MRI began operating in May 1998, it has been managed and operated by Abbott Radiology, through its wholly owned subsidiary, Orchard Park MRI, P.C. All employees providing MRI services at the Southtowns Catholic MRI are employed by Orchard Park.[5]

By memorandum dated July 22, 1998, the Respondent instructed the staff at Mercy Hospital to schedule all MRIs and MRAs at Southtowns Catholic MRI, unless otherwise specified by the patient's doctor. Subsequently, the Respondent stopped referring patients to the Medical Park for MRI procedures.

By letter dated October 13, 1998, the Respondent informed the Union that it was discontinuing MRI services at the Medical Park effective December 1, 1998. The discontinuation of MRI services at the Medical Park resulted in the elimination of two full-time MRI technologist positions within the STC unit.

By letters to the Respondent, dated August 3, 1998, and January 25, 1999, the Union requested detailed information about the formation and operation of Southtowns Catholic MRI. The Union sought information about the employees at the facilities, the type of equipment used, and the relationships among the various entities that formed Southtowns Catholic Associates and Southtowns Catholic MRI. The Union also requested the identity of the officers and directors of Southtowns Catholic MRI, all payroll records and other documents relating to labor costs, and a copy of its articles of incorporation. By letters dated August 3, 1998, and February 5, 1999, the Respondent refused to provide most of the requested information, asserting that Southtowns Catholic MRI is a legal corporate entity, separate and distinct from Mercy Hospital, for which the Respondent does not maintain any information.

On October 26, 1998, the Union filed a grievance over the elimination of the MRI technologist positions and the Respondent's failure to apply the terms of its collective-bargaining agreement with the Union to the employees providing MRI services at the Southtowns Catholic MRI facility. On October 27, 1998, the Union filed the charge in this matter.

I. ANALYSIS

A. Single Employer Relationship and Failure to Apply Agreement

The judge found that the Respondent and Southtowns Catholic MRI, along with the other three entities involved—Southtowns Associates MRI, Abbott Radiology, and Orchard Park MRI—are so interrelated as to constitute what he characterized as "one ball of wax," with no separate corporate identity. He therefore found that the Respondent and Southtowns Catholic MRI are a single employer and that the Respondent violated Section 8(a)(5) and (1) by failing to apply its collective-bargaining agreement with the Union to the employees performing MRI services at Southtowns Catholic MRI facility. For the reasons explained below, we disagree.

Preliminarily, we point out that the complaint alleged a single employer relationship between the Respondent and Southtowns Catholic MRI, but not between the Respondent and any of the other entities. Further, we find that the evidence fails to show a single employer relationship between the Respondent and Southtowns Catholic MRI. We, therefore, do not find that the Respondent was obligated, or indeed was even in a position, to apply its collective-bargaining agreement with the Union to the employees performing MRI services at the new location.

A single employer relationship exists when two or more employing entities are in reality a single integrated enterprise. Four criteria determine whether a single employer relationship exists: (1) common ownership; (2) common management; (3) functional interrelation of operations; and (4) centralized control of labor relations.[6] It is well established that not all of these criteria need to be present to establish single employer status.[7] Single employer status ultimately depends on "all the circumstances of a case" and is characterized by the absence of an "arms-length relationship found among unintegrated

[5] Prior to the formation of Southtowns Catholic MRI, Abbott Radiology owned and operated an MRI machine at the MACC site in a building owned by a group of independent orthopedic physicians. Orchard Park supplied the employees who operated the MRI. Sometime after the Southtowns Catholic MRI facility opened in May 1998, Abbott Radiology closed its own MRI facility at the MACC.

[6] *Broadcast Employees NABET Local 1264 v. Broadcast Service of Mobile*, 380 U.S. 255 (1965); *American Stores Packing Co.*, 277 NLRB 1656 (1986); *Shellmaker, Inc.*, 265 NLRB 749, 754 (1982).

[7] *Denart Coal Co.*, 315 NLRB 850, 851 (1995), enfd. 71 F.3d 486 (4th Cir. 1995).

companies."[8] The Board has generally held that the most critical factor is centralized control over labor relations. Common ownership, while significant, is not determinative in the absence of centralized control over labor relations.[9] Applying this standard to the facts before us, we find, contrary to the judge, that the Respondent and Southtowns Catholic MRI do not constitute a single employer.

B. Common Ownership

Because Southtowns Catholic MRI is owned 50 percent by the Respondent and 50 percent by Our Lady of Victory Hospital, and the Respondent and Our Lady of Victory Hospital are in turn wholly owned by the Catholic Health System, some degree of common ownership is present. Common ownership alone, however, does not establish a single employer relationship. A single employer relationship will be found only if one of the entities exercises actual or active control over the day-to-day operations or labor relations of the other.[10] The record is clear that each of the entities involved in this case retains operational independence.

C. Common Management

Catholic Health System exercises virtually no control over the Respondent, Our Lady of Victory Hospital, or Southtowns Catholic MRI. There is no evidence that the Respondent exercises any actual or active control over Our Lady of Victory or vice versa. More importantly, it has not been shown that the Respondent exercises any control over Southtowns Catholic MRI.

The judge found common management based on the following: James Connolly was president and chief operating officer of both the Respondent and Southtowns Catholic MRI until February 1999. In February 1999, Connolly was succeeded by John Davanzo at the Respondent, but Connolly remained as president of Southtowns Catholic MRI. Both Connolly and Davanzo were on the board of directors for Southtowns Catholic MRI. Further, the board of directors for the Respondent and Our Lady of Victory, who jointly own Southtowns Catholic MRI, are identical.

We find that the factors relied upon by the judge are insufficient to establish common management. During the time that Connolly was President of both Southtowns Catholic MRI and the Respondent, Southtowns Catholic MRI was not legally able to operate the MRI at the MACC, because it had not obtained the necessary licenses from the State of New York. Therefore, it was impossible for the Respondent to exercise control over the day-to-day operations of Southtowns Catholic MRI through Connolly, because Southtowns Catholic MRI had no relevant employee operations to control during that period. By the time Southtowns Catholic MRI received its license to operate an MRI in September 1999, the Respondent and Southtowns Catholic MRI had separate presidents. Further, although there is some overlap of directors—i.e., Connolly is a member of the board of directors of both entities—the fact that each entity has its own president with responsibility for the day-to-day operations of the companies precludes a finding of common management based on the existence of common directors.[11]

Similarly, we find that the fact the board of directors of the Respondent and Our Lady of Victory are identical does not evince the necessary overlap of shared operations necessary to find single employer status between those two entities, in the absence of evidence that they also have common officers in control of their day-to-day operating decisions.

D. Centralized Control Over Labor Relations

The judge found evidence of common control over labor relations in the role played by Martin Oscadal at the Respondent and Southtowns Catholic MRI. From 1993 to March 1999, Oscadal was vice-president for human resources for both the Catholic Health System and the Respondent. According to Oscadal, as the human resources official for the Respondent, he was "responsible for all the human resource functions, which would have been: recruitment, employee labor relations, compensation benefits; . . . employee health and workmens compensation."

At the time of the hearing in October 1999, Oscadal was no longer the Respondent's vice president. Instead, since March 1999, he was the human resource official for the Catholic Health System, with responsibility for the facilities under the umbrella of that system, including Southtowns Catholic MRI. As the human resources official for the Catholic Health System, Oscadal was primarily responsible for recruitment and training. Significantly, he testified that he had no responsibility for labor relations, compensation, or benefits. Moreover, although the Catholic Health System includes Southtowns Catholic MRI, the undisputed evidence is that Southtowns Catholic MRI does not have any employees. The employees who staff the new MRI at the MACC site are employed by Orchard Park, a wholly owned subsidiary of Abbott Radiology. Neither Abbott Radiology nor Orchard Park are part of the Catholic Health System, and thus neither operates under the authority of Oscadal as human resources official for the Catholic Health System. Indeed, the undisputed testimony of Oscadal establishes the Respondent does not have any employees at the new

[8] *Dow Chemical Co.*, 326 NLRB 288 (1998); *Alexander Bistritzky*, 323 NLRB 524 (1997); *Blumenfeld Theatres Circuit*, 240 NLRB 206, 215 (1979), enfd. 626 F.2d 865 (9th Cir. 1980).

[9] *Western Union*, 224 NLRB 274, 276 (1976), aff'd sub nom., *United Telegraph Workers v. NLRB*, 571 F.2d 665 (D.C. Cir. 1978), cert. denied 439 U.S. 827 (1978).

[10] *Dow Chemical Co.*, supra.

[11] *Western Union Corp.*, supra; *Dow Chemical Co*., supra at 288-290.

MRI facility; the Respondent does not have any supervisory authority or other relationship with the employees of Orchard Park at the new MRI facility; no personnel policies of the Respondent, or of the Catholic Health System, are applied to the employees at the new MRI facility; and neither the Respondent nor the Catholic Health System controls or is involved in the labor relations or the terms and conditions of employment of those employees.

Ordinarily, Oscadal's testimony would be sufficient to defeat a single employer finding. However, the judge discredited Oscadal's testimony because he found it to be partial and inconsistent with documentary evidence. For instance, the judge found Oscadal's testimony inconsistent with his February 5, 1999 letter to the Union, which stated that the employees providing the MRI services at the new MRI site are employed by Abbott Radiology, that the Respondent had no legal ownership or interest in Abbott Radiology, and that *eventually the employees providing the MRI services at the MACC site would be employed by Southtowns Catholic MRI*. (Emphasis added.)

The judge also cited several additional documents which he described as establishing, contrary to Oscadal's testimony, that Abbott Radiology, Orchard Park, Southtowns Catholic MRI, Mercy Hospital, and the Catholic Heath System are so interrelated as to be functionally dependent on each other. First, he cited the newsletter "Bridge" published by the Catholic Health Systems, which stated "Two Catholic Health Systems hospitals have partnered with Abbott Radiology" on the MRI project.[12] Second, the judge cited an internal memorandum stating that the MRI at the MACC is owned by "Our Lady of Victory, Mercy, and Southtowns Radiology." Third, the judge cited an equipment lease between Southtowns MRI Associates and Orchard Park, signed by Noel Chiantella on behalf of Orchard Park, which shows that Orchard Park was the "lessee"[13] of the MRI equipment owned by Southtowns MRI Associates. Fourth, he cited a lease agreement, dated March 20, 1998, between Southtowns MRI Associates and Orchard Park, signed by Connolly on behalf of the former and Chiantella on behalf of the latter. Fifth, the judge cited two documents titled, "Continuing Guaranty," in which Chiantella signs the first on behalf of Orchard Park, and the second for himself, each as guarantor for a loan by Southtowns MRI Associates as the borrower. Finally, the judge cited a certificate of Southtowns MRI Associate, L.L.C., which states that it is in good standing in the State of New York. The certificate is signed by Dr. Noel Chiantella, Dr. Mary L. Turkiewicz, and Dr. James Connolly, as members of the limited liability corporation. Chiantella and Turkiewicz are physicians of Abbott Radiology. Connolly is the president of Mercy Hospital.

While the Board attaches great weight to an administrative law judge's credibility findings based on demeanor,[14] it may proceed to an independent evaluation of a witnesses' credibility when the administrative law judge, such as here, has based his credibility findings on factors other than demeanor.[15] We have carefully examined the documentary evidence on which the judge based his credibility findings. Contrary to the judge, we find nothing in the documentary evidence which is inconsistent with Oscadal's testimony.[16] We therefore conclude that the judge's refusal to credit Oscadal's testimony was in error. Accordingly, we reverse the judge's credibility findings in this regard.

The General Counsel argues that there is common supervision of the Respondent's employees and the employees who operate the new MRI at the MACC facility via the physicians who form Abbott Radiology. The judge did not address this issue in his decision. The record reveals that Abbott Radiology provides radiological services on a contract basis to the Respondent at several of its satellite facilities, including the Medical Park. Thus, the physicians who form Abbott Radiology regularly directed MRI procedures at the Medical Park. Further, until May 1998, Dr. Noel Chiantella was the director of radiology at the Medical Park. In May 1998, Chiantella was replaced by Dr. Mary Turkiewicz. Both Chiantella and Turkiewicz are members of Abbott Radiology. John Farrell, formerly an MRI technologist for the Respondent at its Medical Park facility, testified that Abbott radiologists at the Respondent's Medical Park

[12] The judge erroneously describes the newsletter as stating "Mercy Hospital and the Catholic Health Care Systems 'partnered with Abbott Radiology' on the MRI project."

[13] The judge inadvertently named Orchard Park as the "lessor."

[14] *Standard Drywall Products*, 91 NLRB 544 (1951).

[15] *Canteen Corp.*, 202 NLRB 767 (1973); *Valley Steel Products Co.*, 111 NLRB 1338 (1955).

[16] The judge found, for example, that Oscadal's February 5, 1999 letter to the Union stating that "eventually the employees providing the MRI services at the MACC site would be employed by Southtowns Catholic MRI," was inconsistent with his testimony that the employees at the Southtowns Catholic MRI facility were employed by Orchard Park. It is undisputed, however, that at the time of the hearing, the employees at the new facility were employed by Orchard Park, consistent with Oscadal's testimony. Thus, we do not agree with the judge that the letter contradicts Oscadal's testimony. Our review of the other documents cited by the judge reveals that they simply do not have any bearing on the subjects about which Oscadal testified. They also do not shed light on the relationship between the Respondent and Southtowns Catholic MRI, the only two entities for which the complaint alleges single employer status. Rather, the documents concern the interrelationships between the Respondent, Southtowns MRI Associates, Abbott Radiology, and Orchard Park.

Member Walsh finds it unnecessary to disturb the judge's credibility finding with regard to Oscadal. The burden to establish single employer status is on the General Counsel, however, and the discrediting of Oscadal's testimony does not provide affirmative evidence supporting the General Counsel's case. See, e.g., *Herick & Smith v. NLRB*, 802 F.2d 565, 568 (1st Cir. 1986) (the disbelief of testimony does not warrant an affirmative finding to the contrary). In addition, for the reasons stated by his colleagues, Member Walsh agrees that the documentation the judge relied on to discredit Oscadal is insufficient to establish that a single employer relationship existed.

directed his work as it related to patient care, and could initiate overtime if emergency MRI's were required (less than one half of one percent of the MRI's). He testified further that Chiantella, and later Turkiewicz, as Director of Radiology, had the authority to discipline MRI technologists.

The record further reveals that at the time of the hearing, Abbott Radiology, through its subsidiary Orchard Park, was managing and operating the Southtowns Catholic MRI facility at the MACC. Thus, Abbott Radiology physicians direct the work of MRI technicians at the new facility. Further, Chiantella manages the facility on behalf of Abbott Radiology.

We find it unnecessary to determine whether there is common supervision via the physicians who form Abbott Radiology. Even assuming that Abbott Radiology physicians exercised Section 2(11) supervisory authority over the MRI technologists working at both the Medical Park and the Southtowns Catholic MRI facility, we would not find this fact to be indicative of single employer status as to the Respondent and Southtowns Catholic MRI. As noted above, the physicians who form Abbott Radiology are not affiliated with the Respondent. Further, they perform duties at the Medical Park and at the Southtowns Catholic MRI facility pursuant to separate contracts with the respective entities that own those facilities. Finally, there has been no showing that the Respondent has, or could, exercise control over the day-to-day operations and labor relations of Southtowns Catholic MRI through the independent physicians who form Abbott Radiology. Accordingly, we find that any common supervision of the Respondent's employees at the Medical Park and Orchard Park's employees at the Southtowns Catholic MRI facility by Abbott Radiology is not probative of the critical issue of whether the Respondent exercises actual or active control over the day-to-day operations and labor relations of Southtowns Catholic MRI.

Based on the above, we find that the General Counsel has failed to demonstrate common control over labor relations between the Respondent and Southtowns Catholic MRI.

E. Functional Interrelation of Operations

We also find that the General Counsel has failed to demonstrate that the Respondent and Southtowns Catholic have interrelated operations. The judge found evidence of interrelated operations in Southtowns MRI Associates' lease of property from the Respondent, and in Southtowns Catholic MRI's lease from Southtowns MRI Associate of the building housing the MRI. The judge found additional evidence of interrelation of operations in the fact that the Respondent was able to close its own MRI facility at the Medical Park as a result of the opening of the Southtowns Catholic MRI facility. The judge found further evidence of an interrelationship in the Respondent's furnishing, through unit employees, linen and garbage service at the Southtowns Catholic MRI site; in the Respondent's loan of an oxygen valve to the new MRI; and in the employment of Virginia Buranich, one of the Respondent's former MRI technologists, at the new site.

Contrary to the judge, we do not find significant the Respondent's lease of land to Southtowns MRI Associates or Southtowns MRI Associates' lease of the building to Southtowns Catholic MRI. Those arrangements are pursuant to written agreements which provide for full reimbursement. In the absence of any indication that the agreements are not arm's length, we do not find that these mutually convenient arrangements detract from the corporate independence of the entities. Similarly, regarding the Respondent's decision to close its own MRI facility and use the Southtowns Catholic MRI facility in its stead, we find that the Respondent and Southtowns Catholic MRI have an arm's-length customer-supplier relationship that does not detract from their separate corporate identities.[17]

The other evidence of interrelation which the judge cited—combined linen and garbage services, the loan of an oxygen valve, and the employment by Southtowns Catholic MRI of a former employee of the Respondent—is not sufficient to show the degree of interrelatedness necessary to find single employer status. The only evidence of shared linen and garbage collection was the testimony of Judith Bondanza, a radiologic technologist with the Respondent. Bondanza testified that the laundry was commingled "(a)s far as I know." She testified further that Orchard Park employees would place their garbage in an area of the MACC owned by the Respondent and an employee of the Respondent would then take the garbage to a dumpster. However, in view of the fact that the Respondent owns the land on which the new MRI facility stands, we are not persuaded that the combined linen or garbage collection is anything other than part of an arm's length relationship between landlord and tenant.

Further, we do not find that the Respondent's loan to the new MRI of its oxygen valve for 3 weeks shows more than a minimal interrelatedness between the Respondent and Southtowns Catholic MRI. As we have discussed above, we find that the Respondent and Southtowns Catholic MRI had basically a customer-supplier relationship. The Respondent had decided it was more economical to use the Southtowns Catholic MRI than the MRI it had previously used at the Medical Park. If an oxygen valve was temporarily needed at the new MRI facility, the Respondent's loan of it to that facility was in its financial interest.

Finally, the record shows that Virginia Buranich voluntarily resigned her position with the Respondent, continuing on a per diem basis, and was hired by Orchard Park. This does not indicate any interchange of employ-

[17] See, e.g., *Dow Chemical Co.*, supra,

ees between the Respondent and Southtowns Catholic MRI.[18]

In summary, based on our examination of the four criteria of single employer status, we find that the record does not substantiate the judge's characterization of the two entities at issue here. Although there is some degree of common ownership, in that the Respondent is one of two 50 percent owners of Southtowns Catholic MRI, the other three factors, including the "critical" factor of centralized control of labor relations, are absent. Based on this record, we find that the Respondent and Southtowns Catholic MRI are not a single employer. We therefore dismiss the allegation that the Respondent violated Section 8(a)(5) and (1) by failing to apply its collective-bargaining agreement with the Union to the employees of Orchard Park performing MRI services at the Southtowns Catholic MRI facility.

F. Failure to Bargain Over Relocation Decision

The judge dismissed the complaint allegation that the Respondent violated Section 8(a)(5) and (1) by failing to bargain with the Union over its decision to relocate the MRI services from the Medical Park facility to the Southtowns Catholic MRI facility.

By its October 13, 1998 letter, the Respondent notified the Union that it was discontinuing the MRI services at the Medical Park location. The Union's President, however, admitted that at no time did the Union request bargaining over the decision to relocate the MRI work. Accordingly, since the Respondent provided the Union with notice of its decision, and the Union never requested bargaining, the Respondent did not violate Section 8(a)(5) and (1) by refusing to bargain over the decision to relocate the work.[19]

G. Failure to Bargain Over Effects of Relocation Decision

The complaint alleged that the Respondent violated Section 8(a)(5) and (1) by failing to bargain over the effects of its decision to relocate the MRI services. However, the judge inadvertently failed to make a finding on this issue.

As set forth above, the Respondent provided the Union with advance notice of its decision to relocate the MRI work. The Union, however, never requested bargaining over the effects of that decision.

Based on the Union's failure to request effects bargaining after receiving adequate notice from the Respondent, we dismiss the allegation that the Respondent's failure to bargain was in violation of Section 8(a)(5) and (1) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge, as modified below, and orders that the Respondent, Mercy Hospital of Buffalo, Buffalo, New York, its agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraph 1(a) and reletter the respective subsequent paragraphs accordingly.

2. Delete paragraphs 2(a) and (c) and reletter the subsequent paragraphs.

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C., December 18, 2001

Peter J. Hurtgen, Chairman

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

[18] This is emphasized by the negative reaction of Chiantella, as the director of the new MRI facility, when Buranich was called over by Timothy Hogan, a vice president of the Respondent, to the Medical Park to perform an MRI.

Similarly, we do not find any significant interchange between employees, as the General Counsel asserts, in either the operation of the teleradiology unit or in the fluoroscopy procedures for shoulder arthrograms at the new MRI facility. The Respondent's radiology department at the MACC is housed next door to the new MRI facility. In its radiology department, the Respondent frequently uses a teleradiology unit to transmit film images over telephone lines to a receiving machine at Mercy Hospital. The Respondent's employees use this unit to transmit film images as part of their regular work. When radiologic technologist Judith Bondanza protested to the Respondent's clinical supervisor, Mike Bailey, that unit employees were being diverted from caring for their own patients by having to transmit MRI images for Southtowns Catholic MRI, Bailey agreed that this was inappropriate. Bailey requested the radiologic technologists to train the Orchard Park employees to use the teleradiology unit to transmit the MRI images, but this had not occurred as of the hearing.

As for the fluoroscopy procedures, the record shows that Orchard Park radiologists and MRI technologists perform these procedures for one-half hour every day, with the assistance of an employee from the Respondent's radiology department at the MACC.

In neither of these instances do we find sufficient interchange between the employees of the Respondent and the employees of Orchard Park to substantiate a finding of single employer status between either the Respondent and Southtowns Catholic MRI or between the Respondent and any other of the entities involved here.

[19] We, therefore, do not reach the issue of whether the decision was a mandatory subject of bargaining.

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through any representative of their own choice
To act together for mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail and refuse to bargain in good faith with the Union by withholding requested information relevant to the processing of grievances or the administration of its collective-bargaining agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL furnish the Union with the information requested by it in its letters of August 3, 1998 and January 25, 1999.

MERCY HOSPITAL OF BUFFALO

Doren G. Goldstone, Esq., *for the General Counsel.*
Gerald L. Paley, Esq. (Phillips, Lytle, Hitchcock, Blaine & Huber), of Rochester, New York, for the Respondent.

DECISION

STATEMENT OF THE CASE

KARL H. BUSCHMANN, Administrative Law Judge. This case was tried in Buffalo, New York, on October 25–27, 1999, on a complaint dated July 27, 1999, alleging that the Respondent, Mercy Hospital of Buffalo, violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). The underlying charge was filed by the Union, Communications Workers of America, Local No. 1133, AFL–CIO. The Respondent's answer denied the allegations of the complaint.

On the entire record, including my observation of the demeanor of the witnesses and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Mercy Hospital of Buffalo, a not-for-profit corporation located in Buffalo, New York, with other facilities in the western New York area, is a health care institution. With gross revenues in excess of $250,000 and goods and materials valued in excess of $5000 from points outside the State of New York, the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, as well as a health care institution within the meaning of Section 2(14) of the Act.

Southtowns Catholic MRI, Inc., located at Mercy Ambulatory Care Center in Orchard Park, New York, has been engaged in providing magnetic resonance imaging (MRI) diagnostic health care services on an outpatient basis. It is alleged to be a single-integrated business enterprise with the Respondent and a single employer within the meaning of the Act.

The Union, Communications Workers of America, Local No. 1133, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ISSUES

The Respondent's actions in relocating MRI work from unit employees at its Medical Park facility in West Seneca to another facility (Southtowns Catholic MRI), presents several issues:

1. Whether the Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally transferring its MRI work to another facility without bargaining with the Union.
2. Whether the Respondent violated Section 8(a)(1) and (5) of the Act by closing its MRI facility at the Medical Park facility without bargaining with the Union.
3. Whether the Respondent and the new facility, Southtowns Catholic MRI, Inc., constitute a single-integrated business enterprise and a single employer with regard to the Mercy Ambulatory Care Center (MACC), requiring the application of the collective-bargaining agreement to the employees.
4. Whether the Respondent violated Section 8(a)(1) and (5) by refusing to comply with the Union's information requests of August 3, 1998 and January 25, 1999. The allegation with respect to the Union's information request of July 29, 1998, was withdrawn by the General Counsel (G.C. brief p. 2).

III. THE FACTS

Mercy Hospital is located on Abbott Road in Buffalo, New York. Mercy owns and operates several satellite facilities. Among them are the Mercy Diagnostic and Treatment Center, West Seneca, known as the Western New York Medical Park and the Mercy Ambulatory Care Center, known as MACC which provided "immediate treatment," such as emergency, outpatient and laboratory services. Southtowns Catholic MRI is a related entity which is also located at the MACC site.

The Union, CWW, represents two units at Mercy Hospital and its satellite facilities. Since September 26, 1991, the Union has represented the service technical and clerical employees referred to as the STC unit. Since February 28, 1991 the Union has represented the registered nurses or RNs. The parties, namely Mercy Hospital on Abbott Road and its facility, Western New York Medical Park, and the facility, Mercy Ambulatory Care Center (MACC), as well as other facilities, had entered into successive collective-bargaining agreements effective December 21, 1997 to June 3, 1999, and from June 4, 1999 to June 3, 2002, for the STC unit (G.C. Exh. 20). The parties have also operated under a collective-bargaining agreement for RNs effective June 4, 1998 to June 3, 2001.

The STC unit, which is relevant here, included approximately 1100 employees, including John Farrell, an MRI technologist, Virginia Buranich also an MRI technologist, and a part-time MRI technologist, Lisa Sciumeca all of whom were assigned to the Medical Park facility. MRI technologists perform functions which Farrell explained as follows:

> It involves, you know, greeting the patient, screening the patient and putting the patient into the MRI machine, whereby diagnostic images are taken of the internal anatomy . . . .
>
> Those images then are hard-copied. That is to say, they're put on film and given to the radiologist for interpretation . . . . There are x-rays, of course, as well as CAT scan-

> ning, ultrasound . . . a CAT scan is a x-ray procedure whereby a patient is put into a machine and it uses radiation, that being the difference between CAT scan and MRI. Again, diagnostic images are acquired, put on hard film and given to the radiologist for interpretation of the internal anatomy.

The three technologists were assigned to the MRI department under the supervision of Michael Bailey, director of ambulatory services. Bailey had offices at the Medical Park facility and the MACC facility.

Mercy Hospital informed the Union by letter of November 4, 1998, that MRI technologist Virginia Buranich would be laid off effective November 30, 1998, resulting in the elimination of a position with the STC unit (G.C. Exh. 14).

The Respondent informed the Union by letter dated October 13, 1998 as follows (G.C. Exh. 13).

> Re: *Notification of Layoff*
>
> This letter is to advise you that a formal decision has been made to discontinue the MRI service at the Mercy Diagnostic and Treatment Center-West Seneca (MDTC-WS) effective December 1, 1998. The decision to discontinue this service is in accordance with Article 41, Management Rights of our current Collective Bargaining Agreement for the Service Technical and Clerical Bargaining Unit.
>
> The Hospital since it is discontinuing this service, considers this a change in the hours of operation and therefore, in accordance with Article 19, Hours of Work, Section 3, the Hospital is providing you with more then [sic] the required 30 calendar days notice of its action.
>
> The elimination of the MRI service at MDTC-WS will result in the elimination of two (2) positions. These positions are identified below.
>
> | | | |
> |---|---|---|
> | Radiology | MRI Technologist | John Farrell |
> | Radiology | MRI Technologist | Lisa Sciumeca |

On October 26, 1998, the Union filed a grievance about the elimination of the two MRI technologists' positions and the violation of the collectible-bargaining agreement (G.C. Exh. 15). The Union also filed a charge on October 27, 1998 (G.C. Exh. 1). MRI technologist John Farrell resigned after he was notified about the job action and accepted a position with another MRI. The other technologist, Lisa Sciumeca was offered another position with Mercy Hospital as a "CT" technologist at less pay.

The Union made several requests for information from the Respondent, seeking information about the interrelationship between the MRI facilities at the MACC and the Medical Park locations. The Respondent provided certain information but failed, according to the complaint, to comply with the requests dated August 3, 1998 and January 25, 1999.

IV. ANALYSIS

A. The Information Request

The complaint alleges that the Union made several information requests, which the Respondent failed to honor (G.C. Exhs. 10, 11, 25). More specifically, by letters of July 29, 1998, August 3, 1998, and January 25, 1999, the Union requested detailed information about Southtowns Magnetic Imaging at the MACC, and Southtowns Catholic MRI, and Mercy Hospital. The Union sought information about the employees at the facilities, the type of equipment used, and the interrelationship between the various entities. As indicated, the General Counsel has stated in the brief that the Respondent had fully complied with the Union's request of July 29, 1998. The record also shows that the Respondent replied by letter, dated August 14, 1998, relating to the Union's information request of August 3, 1998 (G.C. Exh. 12). However, the Respondent refused to answer any questions concerning the MRI operation at the new MACC facility, and stated that the facility at the MACC is a separate corporation for which the Respondent does not maintain any information (G.C. Exh. 12).

The Union made another information request on January 25, 1999, stating that it had reason to believe that Southtowns Catholic MRI is an alter ego of Mercy Hospital or a joint employer with the Respondent (G.C. Exh. 25). The letter requested numerous documents relating to Southtowns Catholic MRI, such as its articles of incorporation, the number of directors, the identity of officers, all payroll records, as well as documents relating to labor costs. The Respondent replied to the Union's expansive information request in a letter dated February 5, 1999 (G.C. Exh. 26). The Respondent stated in substance that Southtowns Catholic MRI, Inc., is a legal corporate entity, separate and distinct from Mercy Hospital and that previous information provided should have been sufficient for the Union to arrive at the same conclusion. The letter states as follows:

> RE: *Grievance M–119–98/John Farrell & Lisa Sciumeca*
>
> I am in receipt of your request for information regarding the above-referenced dated January 25, 1999. All of the information that you have requested relates to Southtowns Catholic MRI, Inc. and its operations. As has been previously expressed to you on numerous occasions, Southtowns Catholic MRI, Inc. is a separate and distinct legal corporate entity from Mercy Hospital of Buffalo. The documents that you request are the property of Southtowns Catholic MRI, Inc. and are not the property of Mercy Hospital of Buffalo Mercy Hospital. Mercy Hospital has no authority to provide any of the requested information. Therefore, the information that you requested will not be provided by Mercy Hospital to you.
>
> We have attempted to provide reasonable amounts of information regarding the relationship between Mercy Hospital and Southtowns Catholic MRI, Inc. is [sic] an effort to resolve this issue. It is our belief that the information provided to you should be sufficient to determine that Southtowns Catholic MRI, Inc. is not an alter ego of Mercy Hospital and/or a joint employer with Mercy Hospital.

The General Counsel supports the Union's position, arguing that on the basis of numerous documents from prior information requests, the Union was able to form a reasonable basis to conclude that a single-employer relationship existed. Among the numerous indicia of such a relationship known by the Union were the Respondent's exercise of control over employees performing duties as Southtowns Catholic MRI facility, the shared use of certain equipment, certain statements published in Respondent's literature which strongly suggests a partnership between the two entities. For example, a memorandum of July 22, 1998 from Respondent's Director of Operations instructed all nurses and administrative supervisors that MRI/MRA procedures were to use Southtowns Magnetic Imaging at the MACC (G.C. Exh. 3). Moreover, the Respondent permitted the MACC MRI facility to use its oxygen valve and permitted its unit employees to provide linen service and garbage service to

the MACC MRI facility; Respondent's employee Buranich who had been at the Medical Park facility was seen working at the new MACC facility; Buranich was subsequently ordered to perform an MRI procedure at the Medical Park facility; Respondent's unit employees shared work areas and a break area with employees of the MACC facility. These and other situations provided the Union with a reasonable and objective basis for believing that Mercy Hospital and the MRI facility at MACC constituted a single-integrated legal entity.

The record supports the position of the General Counsel. An interrelationship between Mercy Hospital and Southtowns Catholic MRI was clearly evident. The record shows that Mercy owns 50 percent of Southtowns Catholic. Both entities are members of the Catholic Health System. The Union knew that the Respondent had reassigned MRI technologists to the MACC MRI facility, that equipment was loaned by Mercy to the MACC MRI, that several of Respondent's employees performed essential functions at the MACC MRI.

The issue of a single-employer status or an alter ego relationship is relevant to the Union to determine whether an employer had complied with the terms of a collective-bargaining agreement and whether the employer had transferred unit employees. This information is especially relevant because it concerns bargaining unit employees.

The Union must show that it had a reasonable belief that the two companies were in legal contemplation a single employer. *Walter N. Yoder & Sons v. NLRB,* 754 F.2d 531 (4th Cir. 1985). The Union has carried the burden of establishing the relevancy of the requested information particularly considering that the standard of relevancy is a liberal discovery type standard. *NLRB v. Acme Industrial Co*., 385 U.S. 432 (1967). The Union had a reasonable basis for believing that the transfer of unit employees in the Respondent's MRI Park facility were transferred to another facility owned or operated by the same Respondent. The Respondent's position was that the Southtowns MRI facility at MACC was an independent facility. The Union needed the information to determine for itself whether the Respondent is correct. Here, as in *Pence Construction Corp*., 281 NLRB 322 (1986),[1] the Union is entitled to the information requested. I find that the Respondent's refusal to furnish the information violated Section 8(a)(1) and (5) of the Act.

B. Other Violations and the Single-Employer Issue

Any considerations of further violations of the Act require a finding whether or not Mercy and Southtowns Catholic MRI, Inc., constitute a single employer, as alleged in the complaint. Its determination depends upon the basic four factors, common management, interrelationship of operations, centralized control of labor relations, and common ownership. In *Walter N. Yoder & Sons v. NLRB,* 754 F.2d 531 at 535, the court stated that a single employer or alter ego relationship may be established as follows:

> Relevant facts considered by the courts on the single employer issue is (a) interrelation of operations, (2) common management, (3) centralized control of labor relations, and (4) common ownership. *Radio & Television Broadcast Technicians Local Union 1264 v. Broadcast Service of Mobile, Inc.,* 380 U.S. 255, 256, 85 S.Ct. 876, 877, 13 L.Ed.2d 789 (1965); *Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.,* 690 F.2d at 504. The same facts are relevant to the alter ego question; the court's inquiry focuses on "whether the two enterprises have substantially identical Management, business purpose, operation, equipment, customers, supervision and ownership." *Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.,* 690 F.2d at 507. To establish that the information was relevant, the union must show that it had a reasonable belief that enough facts existed to give rise to a reasonable belief that the two companies were in legal contemplation a single employer.

The parties in this case also cite to the Board's decision in *Dow Chemical Co*., 326 NLRB 23 (1998), where the Board observed that a single-employer status is often characterized by an absence of an arm's-length relationship.

With respect to ownership, the record shows that the Respondent owns 50 percent of Southtowns Catholic. In addition, Mercy and Southtowns Catholic are members of the Catholic Health System. Martin Oscadal, vice president for human resources since March 1999 with the Catholic Health System, had previously held the same position with Mercy Hospital. He testified that he was responsible for 5 acute hospitals, 2 home health care agencies, and 13 long-term care facilities, all of which are entities in the Catholic Health System. Among the five hospitals are the Respondent, Mercy Hospital, as well as Our Lady of Victory Hospital, Sisters of Charity Hospital, St. Joseph's Hospital, and Kenmore Mercy Hospital. Southtowns Catholic is owned equally by Mercy Hospital and Our Lady of Victory Hospital, two of the facilities owned and operated by the Catholic Health Systems (G.C. Exh. 43). The record accordingly shows an interrelationship not only between the Respondent and Southtowns Catholic as a result of Respondent's ownership of 50 percent of Southtowns Catholic but also by the 50 percent ownership of Southtowns Catholic by Our Lady of Victory which, like Mercy Hospital, is part of the Catholic Health System. *Pathology Institute,* 320 NLRB 1050, 1058 (1996).

As to common management, the record shows that James Connolly was president and chief operating officer of both entities, Mercy and Southtowns Catholic. In early 1999, Connolly was succeeded by John Davanzo at Mercy, but Connolly remained as president at Southtowns Catholic. John Davanzo and James Connolly together served on the same board of directors for Southtowns Catholic (G.C. Exh. 43). It is clear that Connolly was the president and chief executive officer of both entities at the same time. The board of directors for Mercy and the Our Lady of Mercy Hospital both members of the Catholic Health System were identical. Mercy and Our Lady of Victory jointly owned Southtowns Catholic.

With respect to common control of labor relations the record states that Martin Oscadal, vice president for human resources with the Catholic Health System, held the same title and position at Mercy prior to March 1999. His office was and presently still is located at Mercy Hospital. Oscadal testified at length and explained that while he was in charge of the human resource department at Mercy Hospital from 1993 to March 1999, his responsibilities were as follows (Tr. 328):

> When I was Vice-president at Mercy Hospital, I was responsible for all the human resource functions, which would have been: recruitment, employee labor relations, compensation benefits. I had employee health and workmen's compensation. I had risk management for a period of time. But, in

[1] *Hallen Enterprises,* 330 NLRB No. 163 (2000).

general, I was responsible for the full human resource function at Mercy Hospital.

When asked whether his responsibilities included the satellite facilities, Oscadal admitted that he was responsible for the employees at the Park as well as those at the MACC facilities. And when he became the human resource official for the Catholic Health System, he was responsible for all facilities under the umbrella of the Catholic Health System, including Mercy Hospital and Southtowns Catholic MRI.

The record also shows an interrelationship between the Respondent and Southtowns Catholic. The Respondent argued that Southtowns Catholic leased the building at the MACC site from Southtowns MRI Associates. Under a lease agreement between Mercy Hospital and Southtowns MRI Associates, the latter agreed to build a building on Mercy's property for the purpose of housing a magnetic resonance imaging center (G.C. Exh. 33). This shows a direct relationship between Mercy and Southtowns Catholic by way of Southtowns MRI Associates. As a result of the new MRI facility at the MACC, the Respondent was able to close its MRI facility at the Park. By memorandum of July 22, 1998, the staff at Mercy Hospital were instructed to utilize Southtowns Magnetic Imaging located at the MACC (G.C. Exh. 3). And the nurses at a nurse's meeting were similarly instructed because "it is within our own system" (G.C. Exh. 5). Thereafter, the Respondent discontinued using its Park facility.

The General Counsel also demonstrated several indicia of interrelated activities between the two companies. For example, Judith Bondanza, employed by Mercy as a radiologic technologist, testified that the unit employees of Mercy routinely provide linen service and garbage service for the MACC MRI facility.

Counsel for the Respondent argues that Bondanza's testimony was not reliable, and that Mercy may not have been aware of the garbage pickup by Mercy's employees. However, Bondanza's testimony was unequivocal and credible. She clearly stated that part of her daily activities were to stock the shelves with clean linens and to pick up the dirty linen in blue linen bags to be taken to the receiving area. In this process MACC's blue bag becomes part of Mercy's linen service. She also explained that the garbage gathered at the MACC is disposed by the Respondent's environmental services people in a big garbage dumpster at the side of MACC's area. Respondent's unit employees clearly took responsibility for the garbage at the MACC facility.

John Ferrell, the MRI technologist and former employee at Mercy testified that as of July1998, all in-patients from Mercy were referred to the MACC Center for the MRI procedures, rather than Mercy's Park facility. This directive came from Dr. Turkiewicz. He also requested that the MACC center be furnished with an oxygen valve, a piece of equipment necessary for the MRI procedure by Mercy from its Park facility. Ferrell cleared the request from Turkiewicz with his supervisor, Mike Bailey. The oxygen valve belonging to Mercy was subsequently used by the MACC facility.

The General Counsel also showed that Virginia Buranich who had been an employee at Respondent's Medical Park MRI facility was employed at the MACC MRI facility. According to Farrell's testimony she was directed to perform an MRI at the Medical Park even after she was already assigned to the MACC location. This was clear evidence of an interchange of work and employees between the two entities.

Ordinarily, this scenario would clearly show a single-employer relationship between Southtowns Catholic and Mercy Hospital. However, the record includes the testimony of Martin Oscadal. Martin Oscadal currently the vice president of human resources with the Catholic Health System, and former vice president of human resources at the Mercy Hospital testified as follows (Tr. 352):

> Q. At that time that that new MRI opened in May of 1998, did Mercy transfer any of its employees to staff that new MRI at the MACC?
>
> A. No.
>
> Q. Did OLV transfer any of its employees to staff the new MRI at the MACC?
>
> A. Not to my knowledge, no.
>
> Q. Did Southtowns MRI Associates hire employees to staff the new MRI at the MACC?
>
> A. No. Southtowns Associates does not have any employees. It's primarily a holding company.
>
> Q. Well, who then, provided the staffing to operate the new MRI at the MACC when it opened in May of "98?
>
> A. As it turns out, the individuals who staffed that function or that facility are employed by Orchard Park Medical MRI.
>
> Q. What is Orchard Park Medical MRI?
>
> A. It's a legal entity that is owned by Abbott Radiology, to my knowledge.
>
> Q. And was this the same organization that staffed Abbott's old MRI at the MACC?
>
> A. That's my understanding, yes.
>
> Q. Does Mercy have any ownership interest in Orchard Park Medical MRI?
>
> A. No.
>
> Q. Does Mercy have any ownership interest in Abbott Radiology?
>
> A. No.
>
> Q. What kind of staffing did Orchard Park MRI provide at the new MRI at the MACC?
>
> A. Technical, clerical and some managerial.

Oscadal further testified that Mercy does not have any control over the employees at the MACC MRI facility. Oscadal explained the relationship as follows (Tr. 354):

> Q. Let me ask this question. Who manages the facility at the new MRI at the MACC?
>
> A. Dr. Chiantella, who is part of Abbott Radiology.
>
> Q. Does Mercy have any supervisory authority, direction or control over the employees of Orchard Park Medical MRI?
>
> A. No.
>
> Southtowns Catholic MRI?
>
> Q. Southtowns Catholic MRI is a separate legal entity, which is an Article 28 not-for-profit corporation, in which the MRI actually operates under.
>
> Q. And what was the purpose behind Southtowns Catholic MRI being formed?
>
> A. Well, it was the Article 28 corporation that would actually lease the building from Southtowns Associates and the equipment, and would actually be the billing corporation for MRIs.

When asked whether the creation of Southtowns Catholic affect the management or staffing of the new MRI at the MACC,

Oscadal answered that it did not. Indeed, it was Oscadal's conclusion that Southtowns Catholic had no employees at the MACC site and that the Respondent continued to operate its Medical Park facility, albeit at a reduced level (Tr. 356):

> Q. And so, at this point, does Abbott Radiology continue to manage that facility?
>
> A. Yes.
>
> Q. And does Orchard Park MRI provide the staff employees that staff that facility?
>
> A. Yes.
>
> Q. Are any Southtowns Associates or Southtowns Catholic employees employed at the new MRI at the MACC?
>
> A. No. Neither of the entities actually employs anyone.
>
> Q. After May of "98, did Mercy continue to operate its MRI at the Medical Park?
>
> A. Yes
>
> Q. And who managed the Medical Park MRI for Mercy?
>
> A. That would be Mike Bailey, who is responsible for, who is the supervisor of the satellite imaging functions.

Oscadal's testimony was not only partial, but inconsistent with documentary evidence. He was Respondent's official whose dealings with the Union involved this controversy.

For example, in his letter of February 5, 1999 to the Union, Ocadal stated, *inter alia* (G.C. Exh. 18): At the present time the individuals that provide the services [at the MACC] are employed by Abbott Imaging, LLC. Mercy Hospital has no legal ownership or interest in Abbott Imaging, LLC. *Eventually the individuals providing that service will be employed by Southtowns Catholic MRI, Inc.* (Emphasis added).

Another document, a newsletter "Bridges" published by the Catholic Health Systems, states that Mercy Hospital and the Catholic Health Care Systems "partnered with Abbott Radiology" on the MRI project (G.C. Exh. 9).

An internal memorandum, called "Idea Detail" which recommended the referral of all MRI's to the MACC, states: "The MRI unit at MACC is owned by OLV, Mercy, and Southtown's Radiology" (G.C. Exh. 49).

The equipment lease agreement between Southtowns MRI Associates, L.L.C. and Orchard Park Medical MRI, P.C. shows that Orchard Park was the lessor of the MRI equipment owned by Southtowns MRI Associates, the entity which is affiliated with Southtowns Catholic (G.C. Exh. 37). This document is signed by Dr. Chiantella, who, according to the testimony of Oscadal, administers or manages Abbott Radiology, the owner of Orchard Park Medical MRI.

A lease agreement, dated March 20, 1998, between Southtowns MRI Associates, L.L.C., and Orchard Park Medical MRI, P.C. was signed by James W. Connolly on behalf of Southtowns and Noel M. Chiantella on behalf of Orchard Park (G.C. Exh. 38).

Dr. Chiantella also signed a notarized "Continuing Guaranty" on behalf of Orchard Park as guarantor for a loan by Southtowns MRI Associates as the borrower (G.C. Exh. 42A). He also signed a similar document in his own name as guarantor for Southtowns's loan (G.C. Exh. 42B).

Significantly, in a certificate of Southtowns MRI Associates, L.L.C., stating that it is in good standing in the State of New York, Noel M. Chiantella appears as a member of the L.L.C. Another member and signatory of the document is Mary L. Turkiewicz who as physician has ordered the MRI's to be performed at the MACC. James Connolly as president of Mercy Hospital appears among the signatories.

Medical Management Services, Inc., a billing agent for the Respondent, billed the Respondent on a monthly basis for MRI services performed at Southtowns Magnetic Imaging (G.C. Exh. 36).

These and additional documents in the record show that Mercy and Southtowns Catholic are closely interrelated and that Southtowns MRI Associates, Abbott Radiology, and Orchard Park Medical MRI are so intertwined with the Respondent by common management, officers, leases, and contractual arrangements to be virtually indistinguishable from the Respondent. To suggest that Abbott or Orchard Park are distinct and totally separate from Southtowns Catholic or Mercy Hospital, as Oscadal's testimony would suggest, ignores the total impact of numerous documentary evidence which show just the opposite, namely that these entities constitute "one ball of wax" and that Abbott or Orchard Park did not function without the existence of Southtowns Catholic or Mercy Hospital. Even though the various entities have distinct names and may have been incorporated, the names of their officials, such as James Connolly, past president, and CEO of Mercy, and currently the chief executive of Southtowns Catholic and Southtowns MRI Associates, or Noel Chiantella, vice president and officer of Southtowns MRI Associates and officer of Orchard Park Medical MRI, shows that these entities are all interrelated so as to be functionally dependent on each other. Indeed, the entire record shows that employees and supervisors performed functions interchangeably from one entity to another as if there were no separate corporate identity.

Under these circumstances, I find in agreement with the General Counsel, that the relocation of unit work was unaccompanied by a basic change in the nature of the employer's operation. *Dubuque Packing Co.*, 303 NLRB 386 (1991), enfd. 1 F.3d 24 (D.C. Cir. 1993).

In *Dubuque*, supra at 391, the Board compared the decision to relocate work to a decision to subcontract discussed in *Fibreboard Corp. v. NLRB*, 379 U.S. 203 (1964), and decided that any employer's decision to relocate work becomes a mandatory subject of bargaining under the following circumstances:

> Based on the foregoing considerations, we announce the following test for determining whether the employer's decision is a mandatory subject of bargaining. Initially, the burden is on the General Counsel to establish that the employer's decision involved a relocation of unit work unaccompanied by a basic change in the nature of the employer's operation. If the General Counsel successfully carries his burden in this regard, he will have established prima facie that the employer's relocation decision is a mandatory subject of bargaining. At this juncture, the employer may produce evidence rebutting the prima facie case by establishing that the work performed at the new location varies significantly from the work performed at the former plant, establishing that the work performed at the former plant is to be discontinued entirely and not moved to the new location, or establishing that the employer's decision involves a change in the scope and direction of the enterprise. Alternatively, the employer may proffer a defense to show by a preponderance of the evidence: (1) that labor costs (direct and/or indirect) were not a factor in the decision or (2) that even if labor costs were a factor in the decision, the union

could not have offered labor cost concessions that could have changed the employer's decision to relocate.

Here, the General Counsel correctly points out that labor costs were a factor in Respondent's decision (G.C. brief p. 24): "Thus, Respondent's 'Idea Detail' analyzes the impact of referring all MRI's to the MACC. In that regard, Respondent estimated that there would be personnel savings of $44,634.50 (G.C. Exh. 49)." The General Counsel's reliance on the document entitled, Idea Detail, raises the question, whether the Union could have offered labor cost concessions which would have changed the employer's decision; for the same document shows the following analysis on cost savings (G.C. Exh. 49):

Personnel Cost Savings:	1.00 FTEs
Personnel Cost Savings	44,634.5 $ Thousands
Non-Personnel Cost Savings:	224,600.0 $ Thousands
Additional Savings:	0.0 $ Thousands
	269,234.5 $ Thousands
Other Unit Savings:	0.0 $ Thousands
	269,234.5 $ Thousands
Net Cost Savings:	269,234.5 $ Thousands

The Board observed in *Dubuque*, supra at 391:

> Under the second prong, an employer would have no bargaining obligation if it showed that, although labor costs were a consideration in the decision to relocate unit work, it would not remain at the present plant because, for example, the costs for modernization of equipment or environmental controls were greater than any labor cost concessions the union could offer.

As pointed out by the Respondent, the labor cost savings of $44,634 compared to non-labor cost savings of $224,600 are relatively small and insignificant, so that even if the Union had offered zero labor costs, the other cost factor far outweighed any labor considerations. Moreover, the record shows that labor costs were not the motivating factor in Mercy's decision to close its MRI at the Park and refer all patients to the MRI at the MACC. Farrell, testifying for the General Counsel, stated that the MRI machine at the Park had a limited capacity and was unable to perform Magnetic Resonance Angiograms. He testified as follows (Tr. 30–31):

> Q. Did that power level mean there were certain MRI procedures that could not be done on that particular machine?
>
> A. Yes.
>
> Q. What type of procedures?
>
> A. The machine was not able to do MRAs, which are Magnetic Resonance Angiograms.
>
> Q. Is that a—is that the basic procedure that could not be performed on the machine?
>
> A. There were other exams that as—you know—the technology developed that the MRI machine at the Park was not capable of doing.
>
> Q. All right. Were there occasions when—so far as you know, were there occasions when patients were in need of MRA. services that could not be performed at the Park?
>
> A. Oh, yes.

By comparison, the MRI and the MACC was a more advanced and "state of the art" machine capable of doing MRI as well as MRA procedures (G.C. Exh. 10). I accordingly agree with the Respondent that the record shows that the Union would not have been able to negotiate labor cost savings to affect Respondent's decision to relocate all MRI services to the new MACC facility. The Respondent was, therefore not obligated to bargain over its decision to close one MRI facility and relocate unit work to Southtowns MACC facility. I therefore dismiss this allegation in the complaint. However, the Respondent was not at liberty to ignore its contractual obligations under the collective-bargaining agreement for Southtowns MRI employees at the MACC location. They are part of the STC unit of Mercy Hospital and Southtowns Catholic MRI, Inc., as a single employer.

CONCLUSIONS OF LAW

1. The Respondent, Mercy Hospital of Buffalo is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a health care institution within the meaning of Section 2(14) of the Act.
2. Southtowns Catholic MRI, Inc., at the Mercy Ambulatory Care Center (MACC), and Respondent constitute a single-integrated business enterprise and a single employer within the meaning of the Act.
3. The Union is a labor organization within the meaning of Section 2(5) of the Act.
4. The Union has been the exclusive collective-bargaining representative of the unit of all technical and business office clerical employees employed by Respondent at various locations, as fully described in the complaint.
5. By failing and refusing to apply the collective-bargaining agreement in effect between the Respondent and the Union to the unit employees employed at Southtowns Catholic MRI as MRI technologists and employees performing related MRI work, the Respondent violated Section 8(a)(1) and (5) of the Act.
6. By refusing to furnish the Union the information requested in its letters of August 3, 1998 and January 25, 1999, the Respondent violated Section 8(a)(1) and (5) of the Act.
7. The unfair labor practices described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has violated the Act, it must be ordered to cease and desist therefrom and to take affirmative action necessary to effectuate the policies of the Act. Having concluded that the MRI employees assigned to Southtowns Catholic MRA are part of a single integrated enterprise and a single employer with the Respondent, I recommend that the Respondent be ordered to apply the collective-bargaining agreement to the unit employees at Southtowns Catholic MRI at the MACC and make whole all employees who suffered financial loss as a result of Respondent's failure to apply the bargaining agreement in accordance with *Ogle Protective Service*, 444 F.2d 502 (6th Cir. 1967), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1978). In addition, the Respondent must be ordered to make the employees whole for benefits and contributions under the collective-bargaining agreement as prescribed in *Merryweather Optical Co.*, 240 NLRB 1213 (1979), and *Kraft Plumbing & Heating*, 252 NLRB 891 (1980).

Having further found that the Respondent failed and refused to furnish information necessary and relevant to the Union's performance of its duties as the exclusive collective-bargaining

representative of the unit, the Respondent must be ordered to furnish the information requested.

On these findings of fact and conclusions of law and upon the entire record, I issue the following recommended[2]

ORDER

The Respondent Mercy Hospital of Buffalo, New York, including Southtowns Catholic MRI, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing or refusing to apply the existing collective-bargaining agreement to unit employees employed by the Respondent at Southtowns Catholic MRI as MRI technologists and to employees performing related MRI work.

(b) Failing and refusing to bargain in good faith with the Union by withholding requested information relevant to the processing of grievances or the administration of their collective-bargaining agreement.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following action necessary to effectuate the policies of the Act.

(a) Within 14 days of this Order, apply the collective-bargaining agreement to unit employees employed at Southtowns Catholic MRI at the MACC as MRI technologists and employees performing related MRI work and make the employees whole by paying them backpay and other benefits with interest as discussed in the Remedy section.

(b) Within 14 days of this Order furnish the Union with the information requested by its letters of August 3, 1998 and January 25, 1999.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records, and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facilities in Buffalo, New York, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 3, 1998.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., June 27, 2000

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail or refuse to apply the existing collective-bargaining agreement to unit employees employed by the Respondent at Southtowns Catholic MRI as MRI technologists and to employees performing related MRI work.

WE WILL NOT fail and refuse to bargain in good faith with the Union by withholding requested information relevant to the processing of grievances or the administration of their collective bargaining agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL within 14 days of this Order, apply the collective-bargaining agreement to all unit employees employed by us including those assigned to Southtowns Catholic MRI unit at the MACC and make the employees whole by paying them backpay and other benefits with interest.

WE WILL furnish the Union with the information requested by its letters of August 3, 1998 and January 25, 1999.

MERCY HOSPITAL OF BUFFALO

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[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a Judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."